

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A23-0081**

Janet C. Dreyer, et al.,
Appellants,

vs.

Reierson Construction, Inc.,
Respondent.

**Filed June 26, 2023
Affirmed in part, reversed in part, and remanded
Florey, Judge***

Beltrami County District Court
File No. 04-CV-20-1414

Michael Garbow, Duluth, Minnesota (for appellants)

Hugh E. Mulligan, Nicholas L. Klehr, Klehr & Mulligan, PLLC, Edina, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Bryan, Judge; and Florey, Judge.

NONPRECEDENTIAL OPINION

FLOREY, Judge

Appellants Janet Dreyer, Pamela Gamble, Crystal Hegg, and Andrew Larson challenge the dismissal of their property-damage claims arising from water and/or sewage

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

backup into their homes following a pipe rupture. Appellants argue the district court erred by dismissing the action with prejudice after granting respondent Reiersen Construction Inc.'s motions in limine. Because the district court acted within its discretion in granting respondent's motions in limine, we affirm the district court's evidentiary rulings. Because the record is not devoid of evidence supporting appellants' damages claims, we reverse the district court's dismissal with prejudice and remand to the district court for further proceedings not inconsistent with this opinion.

FACTS

In May 2019, a pipe ruptured in the City of Bemidji, causing water and sewage to backup into appellants' homes. In February 2020, appellants Dreyer, Gamble, and Hegg sued the City of Bemidji¹ and respondent alleging negligent property damage.

In January 2021, appellants filed a motion for summary judgment. The district court denied the motion. At the motion hearing in March 2021, appellants also moved to amend their complaint to add another plaintiff, Larson, which the district court granted. The district court issued a scheduling order setting trial for February 7, 2022. The scheduling order, in relevant part, directed appellants to disclose expert witnesses and opinions by October 1, 2021. Appellants did not disclose their expert witnesses by the October 1 deadline.

A pretrial conference was held on January 31, 2022. During the pretrial conference, the parties agreed to move the trial to a date certain. The district court issued an updated

¹ The district court granted the city's motion for summary judgment and dismissed the city with prejudice in August 2020.

scheduling order following the pretrial conference, setting trial for August 22, ordering parties to submit witness and exhibit lists by July 29, and directing appellants to disclose expert witnesses and opinions by February 28.

In March 2022, respondent requested a new trial date. The district court granted the request and issued an updated scheduling order setting trial for December 5. The updated scheduling order instructed parties to submit witness lists, exhibit lists, proposed jury instructions, and proposed verdict forms by July 29. Respondent filed its witness list, exhibit list, proposed jury instructions, and proposed verdict forms on July 29. Appellants did not file a witness list, exhibit list, proposed jury instructions, or proposed verdict forms by the July 29 deadline.

On July 29, respondent also moved in limine to limit appellants' damage claims to only damages that could be proven at trial and prevent undisclosed damages experts from testifying at trial. Respondent refiled its motions in limine on September 12. A motion hearing was scheduled for November 2. A hearing notice was sent to the parties on September 12, the same day respondent refiled its motions in limine. On September 15, respondent served appellants with its motions in limine, supporting memorandum, affidavit, and proposed order.

The hearing on respondent's motions in limine was held on November 2. Appellants filed a witness list and a response to respondent's motions in limine on November 2, shortly before the motion hearing began.

The district court took the motions under advisement. On November 15, the district court issued an order granting respondent's motions in limine and dismissing the case with prejudice. Appellants' appeal.

DECISION

Appellants claim that by granting respondent's motions in limine the district court granted respondent summary judgment sua sponte. We begin by considering whether respondent's motions were proper motions in limine and whether the district court abused its discretion by granting respondent's motions. We end by discussing whether the district court erred by dismissing the case with prejudice.

I. The district court did not abuse its discretion by granting respondent's motions in limine.

A motion in limine is used to preclude irrelevant, prejudicial, or inadmissible evidence before it is presented to the jury. *Hebrink v. Farm Bureau Life Ins. Co.*, 664 N.W.2d 414, 418 (Minn. App. 2003). A motion in limine functions as a motion for summary judgment when it does not mention "any rules of evidence or other authority" which render the evidence inadmissible and does not argue that such evidence would be irrelevant or prejudicial. *Id.* at 419. Respondent's motions in limine reference specific rules of evidence and argue admitting such evidence would be prejudicial. Therefore, respondent's motions were proper motions in limine.

"Evidentiary rulings concerning materiality, foundation, remoteness, relevancy, or the cumulative nature of the evidence are within the [district] court's sound discretion and

will only be reversed when that discretion has been clearly abused.” *Johnson v. Washington County*, 518 N.W.2d 594, 601 (Minn. 1994) (quotation omitted).

A. The district court did not abuse its discretion by granting respondent’s motion in limine to limit appellants’ damage claims to only those that could be proven at trial.

Respondent moved in limine to limit appellants’ damage claims to only those that could be proven at trial because appellants failed to timely disclose expert witnesses and provided speculative damages estimates, including actual cash-value estimates. The district court observed that appellants did not timely disclose expert witnesses or opinions. The district court found that appellants’ property was not completely destroyed by the May 2019 pipe rupture and stated that the “only evidence regarding calculation of property damages is based upon undisclosed evidence, undisclosed testimony and speculative testimony as to how much repair or replacement would cost.”

When property is totally destroyed, the proper measure of damages is the market value. *Giacomino v. Tri-State Ins. Co.*, 595 N.W.2d 530, 532 (Minn. App. 1999). When property is damaged, but not totally destroyed, “the ordinary measure of damages is the difference in value before and after the loss, or the cost of restoration, whichever is less.” *In re Commodore Hotel Fire & Explosion Cases*, 322 N.W.2d 245, 248 (Minn. 1982). As the district court noted, the replacement cost is not the appropriate measure of damages for damaged, but not destroyed, property and allowing such evidence could confuse the jury. *See id.* (noting district courts have discretion to exclude evidence that “may confuse or mislead the jury”). Further, the district court noted that the estimates provided were speculative, and district courts have authority to exclude speculative evidence that could

mislead the jury. *Id.*; see also *Leoni v. Bemis Co.*, 255 N.W.2d 824, 826 (Minn. 1977) (“The controlling principle governing actions for damages is that damages which are speculative, remote, or conjectural are not recoverable.” (quotation omitted)). Thus, the district court did not abuse its discretion because admitting an inappropriate measure of damages could confuse or mislead the jury. *Id.*

B. The district court did not abuse its discretion by granting respondent’s motion in limine to prevent appellants’ undisclosed damage experts from testifying at trial.

“A district court’s evidentiary ruling on the admissibility of an expert opinion rests within the sound discretion of the [district] court and will not be reversed unless it is based on an erroneous view of the law or it is an abuse of discretion.” *Gross v. Victoria Station Farms, Inc.*, 578 N.W.2d 757, 760 (Minn. 1998). Respondent moved in limine to prevent appellants’ undisclosed damage experts from testifying at trial. It is undisputed that appellants failed to timely disclose expert witnesses. Because appellants failed to timely disclose expert witnesses, the district court did not abuse its discretion by excluding their testimony. See *Uselman v. Uselman*, 464 N.W.2d 130, 138 (Minn. 1990) (stating failure to timely disclose witnesses may warrant the exclusion of their testimony); *Gale v. County of Hennepin*, 609 N.W.2d 887, 891 (Minn. 2000) (noting that the rules of discovery are aimed at preventing “unjust surprise and prejudice at trial, especially where the testimony of expert witnesses is concerned”).

We next consider whether the district court erred by dismissing the case with prejudice.

II. The district court erred by dismissing the case with prejudice.

The district court's order granting respondent's motions in limine and dismissing the case does not indicate the authority by which this case was dismissed. Appellants argue the district court erred by granting respondent summary judgment sua sponte. Because the district court dismissed the action on its own initiative after making its evidentiary rulings, we consider whether the district court erred by granting respondent summary judgment sua sponte.

"We review the grant of summary judgment de novo to determine 'whether there are genuine issues of material fact and whether the district court erred in its application of the law.'" *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017) (quoting *Stringer v. Minn. Vikings Football Club, LLC*, 705 N.W.2d 746, 754 (Minn. 2005)). When a district court grants summary judgment sua sponte, it must give the parties notice of its intent to do so and a reasonable time to respond. *See Phelps v. State*, 823 N.W.2d 891, 895 (Minn. App. 2012) (reversing the district court's sua sponte grant of summary judgment where plaintiffs were "without adequate notice that the district court was considering summary judgment" and were "unable to submit [relevant] documents or any other evidence"); *Septran, Inc. v. Indep. Sch. Dist. No. 271*, 555 N.W.2d at 921 (affirming the district court's sua sponte grant of summary judgment when the district court gave the parties notice of the issue and 18 days to submit briefs). Appellants do not specifically argue that they should have had an opportunity to respond to the dispositive question. Instead, appellants argue that there were genuine issues of material fact.

Appellants point to the conclusions of law from the district court's order granting respondent's motions in limine and dismissing the case as evidence of genuine issues of material fact. Appellants note that they "provided detailed descriptions of their personal and real property losses due to the alleged negligence of [r]espondent" and state that appellants "have the right to testify to their damages." "A fact is material if its resolution will affect the outcome of a case." *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996). Appellants cite no facts that would affect the outcome in the case. Instead, appellants take issue with the district court's conclusions of law and argue that they ought to be allowed to testify as to the damage evidence provided.

The district court granted respondent's motions in limine after finding that appellants' "only evidence regarding calculation of property damages is based upon undisclosed evidence, undisclosed testimony and speculative testimony as to how much repair or replacement would cost." The district court did not abuse its discretion by granting respondent's motions in limine, *see supra* part I, which renders much of appellants' damages evidence inadmissible. However, on review, we cannot determine whether the district court's grant of respondent's motions in limine rendered *all* of appellants' damages evidence inadmissible. *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (noting summary judgment is only proper, as a matter of law, "when the record reflects a complete lack of proof on an essential element").

None of appellants' real property was completely destroyed. For real property that is damaged, but not destroyed, "the ordinary measure of damages is the difference in value before and after the loss, or the cost of restoration, whichever is less." *Commodore*, 342

N.W.2d at 248. The restoration and remodel estimates provided by appellants Dreyer, Hegg, and Larson are inadmissible as a function of the district court's grant of respondent's motion in limine preventing undisclosed experts from testifying at trial. *Uselman*, 464 N.W.2d at 138. Granting respondent's motions in limine also rendered the other estimates, invoices, and receipts provided by appellants Dreyer and Gamble inadmissible. *See id.*; *Commodore*, 324 N.W.2d at 249.

However, appellants Gamble and Hegg submitted inventories of items lost. These inventories appear to include property items that were lost as a result of the May 2019 pipe rupture. When personal property is totally destroyed, damages are measured by the market value before the loss. *Giacomino*, 595 N.W.2d at 532. "If the market value is not available or is not accurate, value may be determined in some other way." *Id.*; *see also, e.g., Lawin v. City of Long Prairie*, 355 N.W.2d 764, 767 (Minn. App. 1984) (affirming the district court's decision to admit replacement cost estimates as evidence of the market value of the property at the time of the loss), *rev. denied* (Minn. Feb. 5, 1985). And a property owner may testify about the market value of property without any particular foundation being laid, *Vreeman v. Davis*, 348 N.W.2d 756, 757 (Minn. 1984); *Williamson v. Prasciunas*, 661 N.W.2d 645, 653 (Minn. App. 2003), but "that rule must be subject to some limitation where the owner of the property is wholly incredible." *Hous. & Redev. Auth. V. Zweigbaum*, 100 N.W.2d 719, 721 (Minn. 1960).

The district court found that "[e]ach [appellant] had property damaged," but appellants failed to provide the market value of the property. We are not convinced the market value is available for all of the items on the inventories nor are we sure appellants

were allowed to demonstrate the value “in some other way.” *Giacomino*, 595 N.W.2d at 532. The district court’s order does not indicate whether it considered the inventories, which could be an alternate way of determining value. Thus, the record may not “reflect[] a complete lack of proof on an essential element,” and thus, the district court erred by dismissing the case. *Lubbers*, 539 N.W.2d at 401 (emphasis added). Therefore, we reverse the district court’s dismissal with prejudice and remand to the district court for further proceedings not inconsistent with this opinion.

In sum, we affirm the district court’s evidentiary rulings on respondent’s motions in limine, rendering much of appellants damage evidence inadmissible. We reverse the district court’s dismissal with prejudice, and we remand to the district court for further proceedings not inconsistent with this opinion.

Affirmed in part, reversed in part, and remanded.